IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Application No.1985 of 2005.
in
FIRST APPEAL NO.885 OF 2005.

Amiraj Construction Company,
Bombay & Another ..Applicant.

Versus

Henry Edward Roche & Others ..Respondents

Mr.Amit Rajnikant Desai, applicant- in person.
Mr.D.S.Kutty for the Respondent Nos. 1 to 3.

CORAM: S.B.MHASE &
S.R.SATHE, JJ.

DATE : 26th July, 2005

P.C.

1. Heard.

2. The Applicant is present in person. Ld. Counsel Mr. Kutty appears for the Respondent. The Applicant is the Original Defendant, while the Respondent is the Original Plaintiff. The work of Warna Project, Construction of Mangrul Tunnel of Warna Left Bank Canal was given by the Government of Maharashtra to the Applicant in accordance with B.I. Tender form. The Respondent is the sub-contractor of the Applicant. As per Schedule B to the said B.I.

Tender, the work of extension of tunneling in wet and dry conditions including drilling and blasting , removal and stacking of excavated stuff as directed with all leads and lifts, including providing ventillation and lighting , dewatering and drainage arrangement etc was to be caried out. The quantity of the work was 33,449 cubic meters rock requiring no support and 231 cubic meters rock requiring support.The rate for excavation of the rock requiring no support was Rs.125.50 per cubic meter, and Rs.130/- per cubic meter for rock requiring support. The case of the Respondent is that, in fact while carrying out work the rock which was estimated in the schedule was not traced and a different rock was traced for which higher rate was required, and therefore, it was a case of extra item. The tender has provided the condition in respect of the extra item and it is condition No.33. As per this condition, the extra item of work shall not vitiate the contract. The Contractor shall be bound to execute the extra item of work as directed by the Executive Engineer, Varana Canal Division No.1, Islampur. The rates for extra item are to be mutualy agreed. That means whenever an extra item is to be carried out by the Contractor, the Contractor has to get the rate of extra item fixed with the Executive Engineer, Varana Canal Division No.1, Islampur. It is

the case of the Respondent that the Extra item rate for hard rock was fixed to Rs.247 per cubic meter and therefore, the claim has been made at the rate of Rs.247 for the excavated quantity of the rock, and since the said amount is not paid by the Appellant, the suit has been filed. Another reason for filing of the suit is that as a result of the non co-operation of the Appellant, the contract was terminated and therefore the breach of contract has taken place and therefore damages have been claimed. In order to ascertain as to whether the extra item has been paid to the Appellant by the Government at the rate of Rs.247 per cubic meter, we have gone through the findings of the trial Court. We have noticed that the finding on issue No.5 is in the affirmative and the said issue is :

"Had Plaintiff proved that the Defendants is deliberately making delay to get the rate fixed with intent to cause hardship to plaintiff in receiving the amount of work done by them.

That means the Applicant has delayed the work of getting the rate fixed. We have repeatedly asked the learned Counsel for the Respondent whether the extra item rate at Rs.247 per cubic meter is fixed by the Executive Engineer, Warna Canal Division No.1, Islampur. The learned Counsel for the Respondent could not produce on record any letter issued by the said Executive Engineer, demonstrating that the extra rate

of item was fixed at Rs.247 at any time and the bill was paid at the rate of Rs.247 by the Government of Maharashtra.

3. It is also pertinent to note that there is no agreement between the Applicant and the Respondent in respect of the extra item to be paid at the rate of Rs.247. On the contrary, the work which was taken as sub-contractor by the Respondent was at lesser rate then that specified in the B.I.Tender. What was that rate, at which Respondent had taken sub contract was not reflected by written agreement and everything was oral. However, it is an admitted fact that out of the total payment which has been received by the Applicant from the State of Maharashtra, the amount as per the agreement between the parties have been paid to the Respondent. The dispute is about the extra item rate, for which no extra item payment has been received by the Applicant.

4. In fact, if the Applicant has not received such amount of extra item rate at any stage at such rate of Rs.247 per cubic meter then how and under what circumstances the Respondent Plaintiff is entitled to claim such a rate is beyond our imagination and we are

unable to understand it. Prima facie, we find that there was no extra item agreement as contemplated under Clause 33 of the B.I.Tender between the Appellant and the State of Maharashtra, thereby the Respondent cannot claim the said rate. The said appeal involves questions of facts and triable issues. From the submissions made by the Appellant it is also found that there is a chequored history of the litigation. We need not go into all this at this stage. We only observe that all this requires thorough consideration. We prima facie find that the decree suffers from several errors which are required to be rectified at the time of final hearing and therefore even though it is a money decree, we are inclined to stay the execution of the said decree.

6. Civil Application is hereby allowed. Execution of impugned decree is stayed till final disposal of the appeal.

7. C.A. stands disposed of.

8. Hearing of the appeal is expedited.

(S.R.SATHE, J.) (S.B.MHASE,J.)